IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. KRUGER

STATE OF NEBRASKA, APPELLEE,
V.
BRIAN R. KRUGER, APPELLANT.

Filed April 10, 2012. No. A-11-146.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

James Martin Davis, of Davis Law Office, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Brian R. Kruger appeals his conviction for tampering with a witness, arguing that the evidence was insufficient and that the court erred by refusing to give his proposed jury instruction. We find sufficient evidence by which the jury could conclude that Kruger's offer of a monetary settlement was an attempt to cause the alleged victim to withhold testimony. Because the jury instructions as a whole correctly stated the law and adequately covered the issues, the court did not commit reversible error by refusing Kruger's proposed instruction. Accordingly, we affirm.

BACKGROUND

A company owned by Kruger and his grandfather handled promotional events in Omaha and Lincoln, Nebraska, for a brewing company. Kruger hired K.J. as a "promotional specialist." One of the rules that Kruger was to abide by was to not have a relationship or affair with any of the promotional specialists. After K.J. worked some promotional events on May 1, 2009, she and

a fellow promotional specialist went to a bar and were later joined by Kruger. K.J. testified that shortly after finishing a drink, she started feeling differently, like everything around her was closing in on her, but she did not feel intoxicated. Kruger offered to drive K.J. home, and her last memory of the evening was getting into Kruger's vehicle.

According to Kruger, K.J. had been very "flirty" with him. He testified that she was "somewhat" intoxicated and "having a good time." While Kruger was in the process of driving K.J. to her home, she suggested going to Kruger's place. K.J. sent a text message to her mother, with whom she lived, that said she was safe. Once inside Kruger's apartment, they engaged in sexual intercourse. Kruger testified that K.J. was not passed out and did not appear to be so drunk that she could not understand what she was doing.

On the morning of May 2, 2009, K.J. awoke in a strange place, wearing nothing but a towel draped across her body. She realized that she was alone in Kruger's apartment. K.J. sent a text message to her boyfriend telling him the address on the door and that she thought she had been raped. She then forwarded that same text message to her sister. That morning, K.J. went to the hospital. She directed the nurse to call the police. While at the hospital, K.J. received text messages from Kruger and missed two telephone calls from him. One message stated that Kruger heard K.J. was in the hospital and asked what happened. That afternoon, K.J. called one of her promotional coworkers and called a superior of Kruger's to say that she did not want to work with Kruger anymore because she was raped by him. Kruger testified that later in the afternoon was the first time he found out that K.J. was alleging that they had engaged in nonconsensual sex. On May 3, Kruger sent K.J. a text message stating, "i really dont remember what happened last night but being that you havent responded i assume your mad about something so im sorry if i did something wrong." Kruger sent K.J. the following two text messages on the afternoon of May 4: "can we meet and talk to try to figure out what happened? i dont like this feeling at all" and "im telling you the truth will set me free and youve got one shot at hearing it."

On May 5, 2009, a doctor informed K.J. that the drug screen of her urine sample from May 2 came back positive for benzodiazepines. K.J. then met with Det. Robert Butler of the Omaha Police Department and informed him that she had been receiving text messages from Kruger. She agreed to make a one-party consent telephone call, in which her conversation with Kruger would be recorded, but Kruger did not answer her call. Approximately 2 hours later, Kruger sent a text message stating, "i dont think i should meet or talk to you, youve gone too far. im sorry you feel that i hurt you but instead of letting you know what happend i have to shut up." K.J. later sent Kruger a text message stating that she would call him the next day. Kruger testified that he suspended himself from handling promotions in Omaha that day "to try to protect myself from sexual harassment and things of that nature." Because he was K.J.'s boss and he had sex with her at a time when she had been drinking, Kruger testified that he knew he might get sued. Kruger was fired the next day.

Among the text messages that Kruger sent on May 6, 2009, were "can your process server find me already?" and "can you also give me your attorneys name so mine can talk to them?" One of the text messages that Kruger sent on May 7 stated, "are you doing anything or not i would like to be able to get on with my life." Later that night, K.J. was able to record a one-party consent telephone call. During the call, Kruger made several comments that he should not be talking to K.J. because she was going to give the information to her attorney. The

conversation began and ended with discussions about K.J.'s attorney, even though K.J. did not have one. Kruger mentioned a restraining order, but K.J. did not think she had one and testified that she had not filed any paperwork against him. Kruger sent K.J. additional text messages on May 13 and June 4.

On June 8, 2009, Kruger met with Butler at the Omaha Police Central Headquarters. He relayed his version of the events from May 1 and 2. Butler told Kruger not to call or text K.J. or to send her messages through mutual friends. Butler testified that he could "tell someone not to contact a witness [who is] in an investigation that I'm investigating," but he admitted that he had no legal authority to order someone not to do so. Butler testified that at the time Kruger left the interview, Kruger had agreed to a second interview, which took place July 30.

In July 2009, Kruger sent K.J. 12 text messages. The dates, times, and messages are as follows:

7/23/09 8:02 pm	hey its brian i dont want to be mean harass or anything bad to you but are you at all interested in a settlement? If you say no i wont bug you again
7/23/09 8:04 pm	im also not admitting guilt in anyway but i want this to be over
7/23/09 9:51 pm	I dont have money to say you right now but ill make you an offer for now that gets interest and is payable in eight months
7/23/09 10:04 pm	If im being out of line please say so
7/24/09 9:22 am	5000 with twelve percent interest and one thousand if you sign today
7/24/09 9:29 am	And because i do actually care about you ill say for six months of psych stuff if you feel the need
7/24/09 9:41 am	There is no price i can put on how you feel you were wronged but if this keeps going it will kill my grandfather literally
7/24/09 9:50 am	I dont want to argue over the past but lets work on an amicable future . . . I got hurt too not that you remember why
7/24/09 9:58 am	Does any of this work for you?
7/24/09 10:03 am	Can i throw in a donation to charity
7/24/09 11:08 am	Would you like me to talk to your attorney?
7/24/09 1:21 pm	10000

K.J. testified that she did not have an attorney as of July 24, 2009. She interpreted the last text to mean that Kruger wanted to give her $10,000. She did not respond to any of the text messages.

Kruger testified that he offered K.J. money because he wanted to settle with her civilly and he wanted the allegations to go away. When asked if he "wanted her to shut up," Kruger answered, "Yeah." Kruger testified that he heard K.J. had an attorney and that after speaking with his superior with the brewing company, Kruger was concerned that there might be a lawsuit pending. By late July 2009, Kruger testified that he was not concerned about being arrested but had concerns about the allegations. Kruger testified that he was not aware of any court proceeding involving him and K.J., but he admitted that he knew there was a criminal investigation under way at the time he sent the text messages. When K.J. was asked if she had initiated any type of criminal or civil proceedings, she answered, "No, all I did was just report -- went to the hospital, so I didn't get a lawyer or anything."

Kruger was arrested on August 2, 2009. On August 4, the State filed a complaint in county court charging him with first degree sexual assault and tampering with a witness. The State subsequently filed an information in the district court charging Kruger with the same crimes.

During cross-examination by Kruger's counsel, Butler testified that he did not have any legal authority to order someone not to contact a witness. Kruger's counsel next asked if a person could ignore Butler's admonition by contacting another person and not be in violation of the law, and Butler answered, "That's called tampering with a witness and that's against the law." There was no objection, motion to strike, or request for a cautionary instruction.

At the end of the State's case, Kruger asked the court to dismiss both counts. The court overruled the motion. After the defense adduced evidence and rested, Kruger again moved to dismiss the tampering with a witness charge. The court overruled the motion. During closing arguments, the State argued that Kruger committed the crime of tampering with a witness by sending the text messages to K.J., offering her money, and trying to get her to "just shut up." The State mentioned that Kruger offered K.J. money after being warned by K.J. and Butler not to have contact with K.J., but it did not advance an argument that Kruger committed the crime by merely disobeying Butler. Kruger's counsel argued that the text messages were an attempt at "[m]aking it right with [K.J.]," but that Butler then arrested Kruger for disobeying Butler. The jury found Kruger not guilty of first degree sexual assault but guilty of tampering with a witness. The court subsequently sentenced Kruger.

Kruger timely appeals.

ASSIGNMENTS OF ERROR

Kruger assigns that the district court erred in (1) submitting the witness tampering charge to the jury for consideration rather than dismissing it when there was insufficient evidence to support a conviction and (2) failing to give his proposed jury instruction that disobeying a police officer about contacting a witness does not constitute tampering with a witness but is evidence to be considered along with all other evidence.

STANDARD OF REVIEW

In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

Whether a jury instruction is correct presents a question of law. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions. *Id.*

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was

prejudiced by the court's refusal to give the tendered instruction. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

ANALYSIS

Sufficiency of Evidence.

We analyze Kruger's first assignment of error, which attacks the overruling of his motions to dismiss and for a directed verdict, as a challenge to the sufficiency of the evidence. In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. But the defendant may challenge the sufficiency of the evidence for the conviction. *State v. McCave, supra*.

Tampering with a witness is a crime under Neb. Rev. Stat. § 28-919(1) (Reissue 2008), which provides:

> A person commits the offense of tampering with a witness or informant if, believing that an official proceeding or investigation of a criminal or civil matter is pending or about to be instituted, he or she attempts to induce or otherwise cause a witness or informant to:
>
> (a) Testify or inform falsely;
>
> (b) Withhold any testimony, information, document, or thing;
>
> (c) Elude legal process summoning him or her to testify or supply evidence; or
>
> (d) Absent himself or herself from any proceeding or investigation to which he or she has been legally summoned.

Even though Nebraska's tampering statute is based on the Model Penal Code § 241.6, 10A U.L.A. 632 (2001), Kruger relies upon cases addressing statutes that do not contain similar wording. For instance, the statute at issue in *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988), stated:

> "A person who offers any bribe to any person who the offeror believes has been or may be summoned as a witness or juror in any judicial or arbitration proceeding, or any legislative hearing, or who makes any threats toward such person or who forcibly or fraudulently detains or restrains such person, with the intent to improperly influence such witness or juror with respect to the witness' or juror's testimony or decision in such case, or to prevent such person from testifying or serving in such case, or who, in retaliation for anything lawfully done by any witness or juror in any case, harasses such witness or juror, commits an aggravated misdemeanor."

The Iowa appellate court determined that offering money "with the intent to deter a victim from signing a complaint or causing a criminal complaint to be filed does not satisfy [the statute]," *id.* at 52, because it did not prove intent to influence a witness' testimony. The pertinent statute in *People v. Cribas*, 231 Cal. App. 3d 596, 608, 282 Cal. Rptr. 538, 545 (1991), stated that

> any person who "gives or offers, or promises to give, to any witness, person about to be called as a witness, or person about to give material information pertaining to a crime to a law enforcement official, any bribe, upon any understanding or agreement that the testimony of such witness or information given by such person shall be thereby influenced is guilty of a felony."

In *Cribas*, the defendant argued that all he did was ask the witness to drop the charges, and the appellate court reasoned that "[a]sking her to withdraw the charges is no more the equivalent of influencing her testimony than it is of inducing her not to attend the trial." *Id.* at 609, 282 Cal. Rptr. at 546. Given the vast differences in the applicable statutes, we do not find these cases to be helpful to our analysis under the Nebraska statute. Further, we note that the Nebraska Supreme Court determined an offer of money to not report a fondling incident to the police was sufficient to sustain a conviction for witness tampering. See *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995).

The court instructed the jury as to the material elements of tampering with a witness as follows:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [Kruger] of the crime of Tampering with a Witness as charged in Count II of the Information are:
>
> 1. That [Kruger] on or about the 1st day of May through the 31st day of July, 2009, in Douglas County, Nebraska, believed that a criminal matter was pending, or about to be instituted; and
>
> 2. That he attempted to induce or otherwise cause a witness to withhold testimony or any document or thing; and
>
> 3. That the act referred to was done intentionally.

Accordingly, our examination is limited to whether the evidence was sufficient to support a conviction under § 28-919(1)(b).

A rational jury could have found that the essential elements of witness tampering were proved beyond a reasonable doubt. There can be no doubt that Kruger was aware a criminal investigation was in progress at the time he sent the text messages; he admitted as much. He knew that he was being accused of sexually assaulting K.J., and he had met with the police to tell his side of the story. As of June 2009, Kruger knew that a criminal investigation was ongoing--he even asked the police to obtain video surveillance from his apartment building--and he agreed to a later interview. The jury had the text messages that Kruger sent to K.J., and he did not dispute the content of any of the messages. He further testified that he offered money to K.J. because he wanted her to stop talking and that he wanted the allegations against him to go away. Viewed in the light most favorable to the State, we determine there is sufficient evidence that Kruger attempted to induce or otherwise cause K.J. to withhold testimony. The jury was free to reject Kruger's alternative explanation that he was offering K.J. money as a civil settlement. We find no merit to this assignment of error.

Jury Instruction.

Kruger next argues that the court erred by failing to give his proposed jury instruction. The instruction Kruger wished to have given stated:

> The fact that [Kruger] may have disobeyed a police officer by contacting [K.J.] does not constitute tampering with a witness. Under normal circumstances a police officer has no legal authority to enforce such a command. Any evidence in this regard is admissible solely for the purpose of considering the elements of [tampering with a witness] contained in Instruction number [9].

The proposed instruction is a correct statement of the law, and Kruger contends that the instruction was warranted by the evidence. Butler testified that he told Kruger not to have any more contact of any kind with K.J. Then, during cross-examination, Butler was asked, "[I]f they contact another person you don't want them to that may be something that you don't like, but in and of itself that's not against the law; isn't that true?" Butler answered, "That's called tampering with a witness and that's against the law."

Kruger was not prejudiced by the refusal to give his proposed instruction, because the instructions as a whole correctly stated the law, were not misleading, and adequately covered the issues. In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011). The first instruction given to the jury was that "[i]t now becomes my duty to instruct you in the law" and "you will apply the law given to you in all these Instructions, even though you believe that the law should be otherwise." As set forth in the discussion above, the court also instructed the jury on the material elements for the crime of tampering with a witness. Kruger's proposed instruction addressed disobeying a police officer by contacting a witness, which is not one of the elements of tampering with a witness. A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). The court's instruction, on the other hand, properly focused the jury's attention on the contested elements of the crime--whether Kruger intentionally attempted to induce or otherwise cause K.J. to withhold testimony. Kruger's requested instruction would have been confusing to the jury by tending to contradict the straightforward elements contained in the instruction given by the court. This assignment of error lacks merit.

CONCLUSION

We conclude that the evidence was sufficient to sustain Kruger's conviction for tampering with a witness and that the court's refusal to give Kruger's proposed jury instruction did not constitute prejudicial error.

AFFIRMED.